SUBCHAPTER E : FREEZING THE PROCESS

§80.201. Applicability.

(a) This subchapter applies to permit hearings as designated in the hearing notice, except as provided as follows, as well as to other hearings designated by the judge for good cause.

(1) Unless the parties agree, this subchapter does not apply to permit hearings at which jurisdiction is established before July 22, 1994.

(2) Notwithstanding the designation made in the notice of hearing, an application may either be included in, or excluded from, the applicability of this subchapter or any portion of this subchapter by:

(A) agreement of the parties with the judge's approval; or

(B) the judge for good cause. Good cause may include without limitation a finding that the lack of complexity of a proceeding in a hearing does not warrant the implementation of all or a portion of this subchapter.

(b) When evaluating whether this subchapter should apply to a permit hearing, the judge shall consider at a minimum:

(1) the number and sophistication of the parties or potential parties;

(2) the expected length of the hearing; and

(3) the complexity of the issues. The judge shall allow the parties to present evidence and argument regarding this determination.

(c) If a judge orders a contested case hearing to be placed under the provisions of this subchapter after the notice of hearing, the judge shall allow reasonable time for all parties to comply with the requirements of this subchapter.

(d) The commission rules for contested case hearings apply to cases conducted under this subchapter, unless those rules conflict with this subchapter.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.101

§80.203. Procedures for Executive Director and Public Interest Counsel.

(a) Executive director.

(1) After technical review of an application is complete, the executive director shall prepare a draft permit. The executive director shall develop an initial position recommending issuance, issuance with additional or different permit provisions, or denial of the permit. If the executive director recommends denial, he or she shall issue a document summarizing the basis for that position. The executive director shall forward the proposed permit and any additional documents to the chief clerk. This provision does not impair the executive director's ability to return applications.

(2) The executive director may change position based on evidence or other new information. The executive director shall timely notify all parties on the record or in writing if that position changes, and the other parties shall be given the opportunity to respond.

(b) Public interest counsel. The public interest counsel shall comply with all time frames and procedures for protestants under this chapter, unless the judge decides otherwise.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.102 and §265.103

§80.205. First Preliminary Hearing.

In addition to following §80.105 of this title (relating to Preliminary Hearings), the following shall be done at the first preliminary hearing:

(1) the executive director shall:

(A) provide the draft permit;

(B) present the executive director's recommendation on the draft permit; and

(C) provide any additional documents related to the executive director's recommendation on the permit;

(2) the applicant shall:

(A) submit proposed findings of fact and conclusions of law;

(B) identify what constitutes the application; and

(C) provide a total of two copies of the permit application, for use by all of the protestants in the case. These copies shall include all notices of deficiency and the applicant's response to those notices;

(3) the executive director and the applicant shall provide witness lists with addresses, phone numbers, resumés, and expected area of testimony for each witness. These lists may be amended to address the protestants and public interest counsel’s lists of issues.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.106

§80.207. Discovery.

(a) Generally. Except when the judge orders otherwise, discovery in hearings held under this subchapter will be separated into three distinct periods. Within the time frame set for each period in this subsection, the judge shall have discretion to set the duration of each discovery period.

(b) First discovery period. The first discovery period shall last 30 to 80 days beginning immediately after jurisdiction is established. This period is reserved for the protestants' discovery from the applicant. The applicant may conduct limited discovery related to the nature of each protestant (including, for example, the type and date of organization, purpose, and number of members) and whether their source of funding is by a competitor of the applicant.

(c) Protestants' first list of issues. Within 20 days after the end of the first discovery period, the protestants shall:

(1) identify issues based on the applicant's proposed findings of fact and conclusions of law;

(2) include a statement as to the reasonable basis of the protestant's dispute on each issue. It is not a reasonable basis that the applicant has the burden of proof or has not yet proven the assertions in the application;

(3) raise other issues not based on the applicant's findings of fact and conclusions of law;

(4) submit proposed findings of fact and conclusions of law; and

(5) submit witness lists, including addresses, phone numbers, resumés, and expected area of testimony for each witness.

(d) Second discovery period. The second discovery period shall last 30 to 80 days beginning immediately after the protestants' list of issues is submitted. The applicant may begin discovery immediately after the end of the first discovery period, before the protestant submits its list of issues, but this time shall not count in calculating the time for the second discovery period. Discovery during this period shall consist of:

(1) the protestants' discovery from the executive director;

(2) the applicant's discovery from the protestants and the executive director; and

(3) the executive director's discovery from the protestants and the applicant.

(e) Applicant's response. No later than the last day of the second discovery period the applicant may amend the application or proposed findings of fact and conclusions of law to respond to the issues raised by the other parties. Given the nature and degree of amendment, the judge may remand the application to the executive director for further technical review. The applicant may be subject to additional notice, discovery, and hearing requirements. After the time for filing a response under this subsection, the applicant may not file any amendment to its application except as allowed in subsection (h) of this section.

(f) Third discovery period. This period shall last 20 to 45 days immediately following the conclusion of the second discovery period. During this period, any discovery by the protestant or the applicant from the executive director shall be limited to the executive director's position regarding the applicant's response, and the executive director's position regarding the protestants' issues. Discovery from the applicant and the protestants shall be limited to the scope of the protestants' first list of issues and the applicant's response. The judge shall have discretion to limit or expand discovery in this period in the interest of fairness. The judge shall decide which time period listed in subsections (b) or (d) of this section applies to discovery for parties that do not fit into a listed category.

(g) Protestants' second list of issues. On or before the last day of the third discovery period, protestants may submit a second list of issues. The protestants' second list of issues shall be limited in scope to the applicant's response provided under subsection (e) of this section.

(h) Applicants' second response. The applicant may respond to issues raised in the protestants' second list of issues within seven days after the third discovery period. The judge may allow the applicant to respond with a minor amendment and proposed findings of fact and conclusions of law limited to protestants' second list of issues, within seven days after the third discovery period. At the prehearing conference, the judge will consider issues related to any minor amendment filed by the applicant for inclusion in the final issue list. After the time for filing a response under this subsection, the applicant may not file any amendment except by agreement of the parties.

(i) Discovery from executive director. Discovery may be sought of the executive director only according to the following provisions.

(1) After jurisdiction is taken, all parties shall have access to all unprivileged documents in the agency's files without submitting a Public Information Act request or a request for production. The agency shall ensure that privileged documents are removed from agency public files and that all assertions of privilege are made when jurisdiction is taken or in another timely manner.

(2) The executive director shall answer interrogatories and requests for production during the second and third discovery periods.

(3) The executive director shall be subject to depositions during the second and third discovery periods

(j) Interrogatories.

(1) In the first or second discovery period, each party shall be allowed to serve one set of interrogatories, as permitted in the Texas Rules of Civil Procedure. If the applicant uses interrogatories during the first discovery period, the interrogatories shall be considered part of the total number of interrogatories the applicant is allowed during the second discovery period.

(2) In the third discovery period, each party shall also be allowed a second set of 20 interrogatories.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §§265.104, 265.106, and 265.121

§80.209. Freezing the Process.

(a) Prehearing filings. The applicant and protestants shall file findings of fact and conclusions of law, and all parties shall file stipulations to other parties' findings of fact and conclusions of law at least three working days before the prehearing conference. All parties may file motions to limit issues or other pretrial motions before the prehearing conference. Other parties may respond to these motions before or during the prehearing conference.

(b) Prefiled exhibits. Exhibits shall be offered and marked and the judge will rule on their admissibility insofar as possible. At hearing, all objections to exhibits which could have been cured if raised in a timely manner, shall be deemed waived if they were not raised during the prehearing conference. Parties wishing to offer exhibits at any time subsequent to the prehearing conference shall notify all other parties as soon as practicable of their intention to seek leave to submit additional exhibits. The judge has the discretion to permit the offer of additional exhibits for good cause. Good cause includes the need for one party to prepare an exhibit in response to another party's exhibit first seen at the prehearing conference, the need to prepare an exhibit in response to the direct testimony of another party, and other cases which are justified by the party seeking to submit the exhibit.

(c) Prehearing conference and order. Between seven and 14 days after the end of the third discovery period, the judge shall hold a prehearing conference.

(1) The judge shall decide which issues remain and which findings of fact and conclusions of law have been stipulated. Proposed findings and conclusions shall be treated as follows.

(A) A proposed finding or conclusion stipulated by all parties shall be regarded as established.

(B) A proposed finding or conclusion that has not been stipulated, and that the other parties have a reasonable basis for contesting, may be raised as an issue at the hearing. During the prehearing conference, the judge may inquire further into the reasonableness of the basis for contesting the issue. If the judge determines that the other parties have not shown a reasonable basis for contesting the finding or conclusion and the executive director did not raise the issue as a basis for permit denial, the judge shall deem the finding or conclusion stipulated.

(2) The judge shall set final time limits at or before the prehearing conference.

(3) The judge shall promptly incorporate all rulings in a written prehearing order.

(d) Prefiled testimony. The judge may specify time to submit prefiled testimony before final preparation under subsection (n) of this section.

(e) Failure to comply with schedules. Parties who do not identify issues, make amendments, propose findings of fact and conclusions of law, or submit responses according to the schedules established under this subchapter and with the judge's orders will be deemed to have waived the right to pursue them in an evidentiary hearing conducted under this subchapter.

(f) Final preparation. Final preparation for hearing shall extend no more than 14 calendar days from the date of the prehearing conference or from the time the last pre-filed testimony is submitted.

(g) Evidentiary hearing. The evidentiary hearing shall not be longer than 25 days unless, for good cause, the judge extends the time. The judge shall set reasonable time limits for each party to present its case.

(h) Modification of schedules. The scheduled periods set out in this section are presumptive time limits, but the judge may modify them for good cause. Good cause may include without limitation a finding that the complexity or lack thereof of a proceeding warrants modification of one or more of the scheduled periods.

(i) Motion for rehearing. A party may not raise for the first time on motion for rehearing an issue of fact or law that it has not previously raised as a contested issue unless the issue is related to:

(1) a procedural irregularity; or

(2) changed circumstance, where the issue is material and a party demonstrates good cause for failure to raise it as an issue before the prehearing conference. Notwithstanding the foregoing, the commission may exercise its discretion to address an issue not raised by the other parties or remand an issue depending on the evidence in the record.

§80.213. Limiting the Number of Witnesses.

At the request of a party or on the judge's own motion, the judge may prohibit the testimony of unnecessary or excessive numbers of witnesses as follows.

(1) The judge may direct a party to do one or both of the following:

(A) voluntarily reduce its listed witnesses to a specified number; or

(B) provide a summary of the expected testimony of each witness sufficiently specific to show the need for the testimony.

(2) The judge may use the witness lists and any summaries of testimony to strike witnesses whose testimony would be unduly repetitious or irrelevant, or to render discovery and the hearing process manageable.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.107

§80.215. Additional Testimony.

When it appears to be necessary to the administration of justice, the judge may permit additional evidence to be offered at any time.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.113

Adoption of §§80.201, 80.203, 80.205, 80.207, 80.209, 80.213, 80.215
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Derivation Table
Chapter 80 - Contested Case Hearing
Subchapter E : Freezing the Process

This table is to be used to track sections after rule revisions. The column on the left should list the sections after the revision. The column on the right should list where the section was prior to the revision.

New Section	Old Section
80.201 (a)	265.101 (a)
80.201 (b)	265.101 (b)
80.201 (c)	265.101 (c)
80.201 (d)	265.101 (d)
80.203	265.102 and 265.103
80.203 (1) (A) and (B)	265.103 (3)
80.203 (2) (A)	265.103 (4)
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80.203 (a)	265.102 (a)
80.203 (a) (1)	265.102 (a) (1)
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80.205 (3), 80.207 (c) (5)	265.106
80.207	265.104
80.207	265.121
80.209	265.121
80.209 (d)	265.109
80.213	265.107
80.215	265.113